



The Health and Care Act 2022: new legislation – new legacy?

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The Health and Care Act 2022 is a major piece of legislation which garnered considerable publicity in relation to its important introduction of yet another major reorganisation of the National Health Service (NHS) in England and also of aspects of the delivery of social care in the same region. However, its relatively short passage through Parliament (from July 2021 to April 2022) belies its scope and the fact that other aspects of the legislation apply either across the United Kingdom (UK) as a whole or in various parts of the UK other than, or as well as, in England. It introduces new criminal offences concerning virginity testing¹ and hymenoplasty offences which are applicable across the UK jurisdictions,² clearly referencing contemporary concerns.³ The Act provides for the extension of the criminal prohibition on commercial dealing in organs and related offences in England, Wales and Scotland to enable prosecution of those offences where these arise outside the jurisdiction.⁴ Furthermore, legislation concerning international healthcare arrangements, for example, in relation to reimbursement of the cost of emergency medical

1 Ss 136–147 Health and Care Act 2022.

2 Ibid ss 148–159.

3 See further G Iacobucci ‘Doctors call for ban on virginity testing and hymenoplasty discussion’ (2021) 347 *British Medical Journal* n2037 and S Ray ‘The British campaign to ban virginity testing and hymenoplasty’ in M Jaschok, U H Ruhina Jesmin, T Levin von Gleichen and C Momoh (eds), *The Routledge International Handbook of Harmful Cultural Practices* (Routledge 2023).

4 S 170 which inserts a new s 32A into the Human Tissue Act 2004, which applies in England and Wales, and a new s 20A into the Human Tissue (Scotland) Act 2006; and for a background discussion of the law concerning extra-territorial enforcement concerning organ transplantation see further S McGuinness and J V McHale ‘Transnational crimes related to health: how should the law respond to the illicit organ tourism?’ (2014) 34(4) *Legal Studies* 682.

treatment⁵ is broadened beyond its original post-Brexit application to the European Union (EU) and Switzerland. The reforms introduced in the 2022 Act also include amendments to the Human Fertilisation and Embryology Act 1990, which regulates reproductive technology treatment and embryo research across the UK.⁶ This means that those receiving fertility treatment will now be able to store their gametes and embryos for up to 55 years where consent is given to continued storage each decade whereas donors of such material will also be able to consent to storage for up to 55 years without needing reconsent after each decade.⁷ The changes to practice concerning early medical abortions introduced during the Covid-19 pandemic enabling abortion via telemedicine and administration of prescribed administration at the woman's home have now been placed on a permanent statutory basis for England and Wales under provisions in the Health and Care Act 2022 amending the Abortion Act 1967.⁸

The Act also finally implements the recommendations originating from the *Shipman Report* and provides for the creation of medical examiners to provide independent scrutiny of death certificates in England and Wales.⁹ Other aspects of the legislation include plans to license the performance of non-surgical cosmetic procedures in

5 S 162 Health and Care Act 2022. This provision amends the title of the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 to the Healthcare (International Arrangements) Act 2019, with the intention that this will be broader in scope, facilitating arrangements concerning healthcare going beyond those consequent upon withdrawal from the EU. See also now the Healthcare (International Arrangements) (EU Exit) Regulations 2023, SI 2023/854.

6 S 171 and sch 17 of the Health and Care Act 2022.

7 See also Department of Health and Social Care, *Consultation Outcome Gamete (Egg, Sperm) and Embryo Storage Limits: Response to Consultation* (2021).

8 S 178 Health and Care Act 2022; for background on this area see A M Wilson, 'The Health and Care Act 2022: inserting telemedicine into the Abortion Act 1967' (2023) 31(1) *Medical Law Review* 158 and for the broader background on this area J Parsons and E C Romanis, *Early Medical Abortion, Equality of Access, and the Telemedical Imperative* (Oxford University Press 2021).

9 S 169 Health and Care Act 2022 and the Medical Examiners (England) Regulations 2024 (at time of publication of this special issue currently in draft form). The need for reform of the death certification scheme has long been the subject of recommendations: see eg *The Shipman Inquiry Third Report: Death Certification and the Investigation of Deaths by Coroners* (Cm 5854 2003) and see Department of Health and Social Care Guidance, *An Overview of the Death Certification Reforms* (updated 14 December 2023) and see further discussion in M Earle, 'Death' in J M Laing and J V McHale (eds), *Principles of Medical Law* 5th edn (Oxford University Press forthcoming 2024) paras 22.54–22.58.

England.¹⁰ Further regulation of cosmetic procedures is also currently under consideration in Scotland.¹¹ Finally, there is a new role for NHS England to support the Competition and Markets Authority in its functions under the Competition Act 1998 and the Enterprise Act 2002,¹² both UK-wide pieces of legislation. While previous competition and marketisation reforms have focused on England, the underlying interaction between the NHS and private healthcare is UK-wide, and at least in Wales there has been clear evidence of closer interactions in responding to Covid-19 which may be further developed post-pandemic.¹³

Despite the aforementioned range of diverse aspects, the major structural reorganisation of health care delivery in England is one of the aspects of the Act which attracted considerable attention. The Act builds on recommendations for reform set out by NHS England in the 2019 NHS Long Term Plan¹⁴ and was a Conservative Manifesto Commitment in the 2019 UK General Election. Changes of Secretary of State¹⁵ and pandemic responses in that period also helped to shape the development of the 2022 Act. It is the second major reorganisation of the English NHS since the 2010 general election. It repeals aspects of the controversial Health and Social Care Act 2012 introduced by the then Secretary of State for Health, Andrew Lansley. One notable aspect of the 2012 Act was the reduction of ministerial oversight in favour of (then new) arms-length bodies, such as NHS England, NHS Improvement and Public Health England. Section 45 of the Act now reincorporates the Secretary of State's oversight functions over NHS

10 S 18 Health and Care Act 2022. For the background issues to regulation, see further M Latham and J V McHale, *The Regulation of Cosmetic Procedures: Legal Ethical and Practical Challenges* (Routledge 2020).

11 See Scottish Government, *Non-Surgical Cosmetic Procedures Regulation: Consultation Analysis – Final Report* (June 2022) and for background see A Malyon, Scottish Cosmetics Interventions Group (Scottish Government 2015).

12 S 82 Health and Care Act 2022.

13 M Guy, '(How) is Covid-19 reframing interaction between the NHS and private healthcare?' (2023) 23(2) *Medical Law International* 138.

14 Health and Care Act 2022, Explanatory Notes; NHS England, *The NHS Long Term Plan* (January 2019) 13.

15 Sajid Javid MP, Steve Barclay MP, Thérèse Coffey MP, Steve Barclay MP and, since 13 November 2023, Victoria Atkins MP.

England.¹⁶ However, it does not necessarily follow that this represents a reversion to the pre-2012 Act NHS position given the continued existence – and indeed expansion – of NHS England. Moreover, some restructuring was already underway in the years leading up to the 2022 Act. Larger regional groups of service providers – integrated care systems (ICSs) – had been established with the intention of facilitating the integration of delivery of both health and social care. It was eventually agreed that legislation would be needed to enable the full implementation of the changes.¹⁷ The Act replaces Clinical Commissioning Groups which undertook day-to-day commissioning of healthcare services at local level with Integrated Care Boards.¹⁸ The new Boards cover larger areas than their predecessors and they will work as part of Integrated Care Partnerships – new statutory committees which also involve ‘upper tier’ local authorities.¹⁹ The Act also provides for the sharing of anonymous NHS health and social care patient information for purposes relating to the functions of health and social care bodies.²⁰ In addition it established a review of the approach taken to disputes concerning the treatment of critically ill children in England.²¹ The legislation also establishes the Health Services Safety Investigations Body which is a new statutory body concerned with internal NHS patient safety investigations operating in England.²²

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- 16 These were added to the 2021 White Paper by the then Secretary of State for Health and Social Care, Matt Hancock MP. See further discussion in K Syrett, ‘The organisation of healthcare’ in J M Laing and J V McHale, *Principles of Medical Law* 5th edn (Oxford University Press forthcoming 2024) and NHS England, ‘[Creating coherent system leadership](#)’ (24 May 2018). NHS England was called the NHS Commissioning Body under the previous legislation but *de facto* was called NHS England. Its legal name was changed finally by s 1 of the Health and Care Act 2022. NHS Improvement is also now combined with NHS England.
- 17 See, generally, for the background development of ICSs, the Health and Social Care Select Committee Report, *Integrated Care Organisations, Partnerships and Systems* (HC 650 2018).
- 18 S 3 National Health Service Act 2006 as amended.
- 19 NHS England, ‘[What are integrated care systems?](#)’.
- 20 S 96 Health and Care Act 2022.
- 21 S 177 and see also K Moreton, *Literature Review: Disagreements in the Care of Critically Ill Children: Causes, Impact and Possible Resolution Mechanisms* (Nuffield Council on Bioethics 2023) and Nuffield Council on Bioethics, *Disagreements: Critical Care Independent Review* (2023).
- 22 Part 4 Health and Care Bill, and see further, for background on this and on the reforms, J V McHale, ‘Patient safety, the “safe space” and the duty of candour: reconciling the irreconcilable?’ in J Tingle, C O’Neill and M Shimwell (eds), *Global Patient Safety: Law Policy and Practice* (Routledge 2018); O Quick, ‘Duties of candour in healthcare: the truth, the whole truth, and nothing but the truth?’ (2022) 30(2) *Medical Law Review* 324.

The Act also incorporates provisions in relation to social care in England. Section 163 extends the scope of the Care Quality Commission to review the provision of local authority adult social care functions provided for under part 1 of the Care Act 2014. Information is to also be provided by social care providers via the Capacity Tracker operated by the NHS in relation to such things as the number of social care staff, social care beds and Covid-19 vaccination status.²³ The legislation also made provision for the cap on care costs which the Government had signalled would take place.²⁴ At the time of writing the introduction of the cap on care costs has been delayed, and it remains uncertain as to whether it will ultimately be implemented.

This special issue offers UK-wide learning through its primary focus on a number of areas which received considerably less public attention in the lead-up to the passage of the legislation and yet which may leave a considerable legacy for health and social care in the future. The special issue begins with **Keith Syrett**'s paper 'Something in the water: opening the public health law policy window for fluoridation?' The debate over the fluoridation of water and the question of local versus national responsibility has a long history. Syrett critically examines impacts of the provisions in sections 175 and 176 of the 2022 Act concerning water fluoridation in England. He makes use of Kingdon's concept of a 'policy window' and suggests that public acceptance of the new measures may be greater post-Covid-19, but that this remains a contentious issue. **Connor Francis Macis** builds on Syrett's analysis in his commentary, 'Unearthing organic ideology in public health interventions: the case of water fluoridation provision in the Health and Care Act 2022'. He utilises the Gramscian concept of organic ideology as a lens to examine the state as protector in the context of public health interventions²⁵ and highlights the need in developing public health policy for policymakers to 'be mindful of the politico-philosophical underpinnings of public health law and policy'.²⁶

Proper nutrition is an important part of effective recovery from illness. Yet the quality of hospital food has been criticised over many years and remains a matter of controversy. In her paper 'Hospital food standards in section 173 of the Health and Care Act 2022: political

23 S 277A of the Health and Social Care Act 2012. See also the Adult Social Care Information (Enforcement) Regulations 2022, SI 2022/1175.

24 See further Cabinet Office, Department of Health and Social Care and Prime Minister's Office 10 Downing Street, *Build Back Better: Our Plan for Health and Social Care* (updated 8 March 2022) and the *Autumn Statement*, Hansard 17 November 2022, col 844–856.

25 See further C Mouffe, 'Hegemony and ideology in Gramsci' in C Mouffe (ed), *Gramsci and Marxist Theory* (Routledge & Kegan Paul 1979).

26 See Macis below at page 764.

magic with a soggy bottom’, **Ruth Stirton** reviews the changes envisaged by section 173 Health and Care Act 2022 regarding hospital food in England which enable regulation of nutritional standards and of the type of food and drink provided in hospitals. She explores the subsequent developments following the passage of the legislation. Drawing on Edelman’s work on the symbolic uses of politics, the literature on policy fiascos, and Lasswell’s definition of ‘political magic’, Stirton examines the extent to which this legislative provision will provide a substantive effective change in practice in the future.

The problem of delayed hospital discharge and patients being termed by the pejorative term ‘bed blockers’ has been a source of controversy for many years. At the same time, the safety of rapid hospital discharge has come under scrutiny, something tragically highlighted during the Covid-19 pandemic.²⁷ In her paper ‘Choosing home: discharge to assess and the Health and Care Act 2022’, **Jean McHale** examines the developments around hospital discharge law and policy since the 1990s, leading up to the Health and Care Act 2022. She critically examines the new statutory powers enabling rapid patient discharge by moving assessments of duties and powers relating to social care services provided to patients after leaving hospital to be undertaken after patients leave hospital and the challenges which remain. While this represents an English case study, this legislative approach may provide useful lessons for the rest of the UK.

The removal of the competition reforms contained in the 2012 legislation and subsequent shift towards integration in the English NHS is examined using the lens of claims of ‘NHS privatisation’ by **Mary Guy** and **Okeoghene Odudu** in their paper ‘Understanding “NHS Privatisation”: from competition to integration and beyond in the English NHS’. While concerns about an irreversible shift towards ‘NHS privatisation’ were a key feature of parliamentary debates preceding the 2012 Act, Guy and Odudu demonstrate how claims of privatisation can be linked to the wider interaction between the NHS and private healthcare in England,²⁸ so have not disappeared with the focus on integration of the Health and Care Act 2022. Furthermore, it appears that competition has been refocused, rather than removed, by the 2022 Act. This wider interaction between the NHS and private healthcare is also in evidence to varying degrees in Wales, Scotland and Northern

27 See further *R (Gardner and Harris) v Secretary of State for Health and Social Care and Others* [2022] EWHC 96.

28 It is recognised, of course, that concerns about ‘NHS privatisation’ in the sense of using private providers and also of paying for private treatment exist across the UK. See, respectively, “‘Privatisation by stealth!’ – Plaid blasts Welsh Government on NHS plans’ *Tenby Observer* (Tenby 10 January 2023); and ‘NI health: more people than ever paying for private healthcare’ (*BBC News* 23 March 2023).

Ireland, so distinctions with the approach in England can be insightful.

The final piece in this volume, while not within the province of the 2022 Act itself, raises fundamental questions regarding an issue which may soon return for parliamentary consideration. In his commentary ‘Assisted Dying Bill [HL]: ignorance within the House?’ **Chay Burt** goes beyond the 2022 Act to examine the perennial question of assisted dying, an issue which Parliaments in Westminster and the devolveds may have to address in the near future if there is public pressure for them to follow the approach recently taken in Jersey²⁹ and in the Isle of Man where legislation on assisted dying is as of January 2024 currently in progress through the Tynwald.³⁰ Burt identifies lessons drawn from the Canadian medical assistance in dying legislation which may prove a valuable legacy when determining future reforms across the UK.

This special issue arose from a virtual symposium which took place in September 2021, as the Health and Care Bill was making its way through the House of Commons, and was organised by the Centre for Health, Law, Science and Policy (CHLSP) at the University of Birmingham. This event brought together researchers working on themes arising in the Bill to discuss the proposed legislation and share insights. Many of these discussions find reflection in the papers which comprise this special issue. The Guest Editors would like to express their thanks to Professor Mark Flear, Chief Editor of the *Northern Ireland Legal Quarterly* for supporting this special issue, Marie Selwood for her editorial assistance, the contributors of submissions, and finally the anonymous reviewers who very kindly read and provided feedback on the article drafts.

29 Government of Jersey, ‘[Assisted dying in Jersey](#)’ and see also R Huxtable, T Lemmens and A Mullock, *Assisted Dying in Jersey: Ethical Review Report* (Strategic Policy, Performance and Population November 2023).

30 Assisted Dying Bill 2023.